

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FRANKLIN BENJAMIN, by and through :
his next friend, Andreé Yock; RICHARD :
GROGG and FRANK EDGETT, by and :
through their next friend, Joyce McCarthy; :
SYLVIA BALDWIN, by and through her : Civil Action No. 1:09-cv-1182-JEJ
next friend, Shirl Meyers; ANTHONY :
BEARD, by and through his next friend, : Class Action
Nicole Turman, on behalf of themselves :
and all others similarly situated, : Complaint Filed June 22, 2009
:
Plaintiffs, :
:
v. :
DEPARTMENT OF PUBLIC WELFARE :
OF THE COMMONWEALTH OF :
PENNSYLVANIA and GARY :
ALEXANDER, in his official capacity as :
Acting Secretary of Public Welfare of the :
Commonwealth of Pennsylvania, :
:
Defendants. :
:

SETTLEMENT AGREEMENT

I. Introduction

WHEREAS on June 22, 2009, Plaintiffs filed this class action lawsuit, alleging, *inter alia*, that Defendants violated Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA) by unnecessarily segregating class members in state intermediate care facilities for persons with mental retardation (ICFs/MR);

WHEREAS the District Court by Order dated September 2, 2009 certified this case to proceed as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on behalf of all individuals who (1) currently or in the future will reside in one of Pennsylvania's state ICFs/MR; (2) could reside in the community with appropriate supports and services; and (3) do not or would not oppose community placement;

WHEREAS the District Court by Memorandum and Order dated January 27, 2011 ruled that Defendants violated and were liable under Title II of the ADA and Section 504 of the RA by failing to offer community services to Plaintiffs and class members;

WHEREAS Plaintiffs and Defendants desire to reach consensus on an appropriate remedy that will resolve this lawsuit amicably and avoid the risks and expense of further litigation;

NOW, THEREFORE, Plaintiffs and Defendants enter into this Settlement Agreement.

II. Definitions

1. "AEs" means the Administrative Entities that contract with the Department of Public Welfare to administer the community intellectual disabilities system in specific geographic areas.

2. "Agreement" means this Settlement Agreement.

3. "Class members" means all persons who: (1) currently or in the future will reside in one of Pennsylvania's state ICFs/MR; (2) could reside in the community with appropriate supports and services; and (3) do not or would not oppose community placement.

4. "Community placement" means residential and non-residential services and supports appropriate to meet the needs of the individual. "Residential supports and services" means living independently in one's own home or with family while receiving supportive services; living in a family living ("life-sharing") home licensed under 55 Pa. Code Ch. 6500; or living in a group home licensed under 55 Pa. Code Ch. 6400 that, unless the person chooses otherwise, houses no more than four people and that is not contiguous with other homes that serve people with disabilities or on a campus-type setting that serves people with disabilities.

5. "Community Waiver services" means services provided under the Consolidated Waiver or the Person/Family Directed Support Waiver and any future Medical Assistance programs that might succeed those waivers.

6. "CPP" means the Community Placement Plan that is developed for each resident of a state ICF/MR pursuant to the individual support planning process and that establishes the basic understanding of what services and supports the resident would need if he or she were to move to a community placement.

7. "DRN" means the Disability Rights Network of Pennsylvania.
8. "DPW" means the Department of Public Welfare of the Commonwealth of Pennsylvania, its officials, employees, agents, and successors.
9. "Effective Date" means the date that the Agreement is signed by all parties.
10. "Facility Advocate" means an individual employed by DRN under contract with DPW who is assigned to each state ICF/MR to advocate for residents.
11. "Facility Director" means the individual designated by ODP to oversee and administer the day-to-day operation of a state ICF/MR, including any interim or acting Facility Director.
12. "Guardian" means an individual appointed by a Pennsylvania court pursuant to 20 Pa. C.S.A. Ch. 55 to serve as the guardian of the person for a resident of a state ICF/MR.
13. "Involved family" means family members of a state ICF/MR resident who are designated as the resident's substitute decision makers in the CPP or other state ICF/MR records.
14. "ISP" means the Individual Support Plan created for each state ICF/MR resident (through a process in which the resident, family members and representatives, and members of the resident's Interdisciplinary Team participate)

that assesses, identifies, and coordinates the needed supports and services for the resident.

15. "ODP" means the DPW Office of Developmental Programs, its officials, employees, agents, and successors.

16. "State ICFs/MR" means Ebensburg Center, Hamburg Center, Polk Center, Selinsgrove Center, White Haven Center, and any other facility licensed as an ICF/MR that Pennsylvania may operate or administer in the future.

III. Identification of Class Members

1. DPW will create, maintain, and update as needed a State ICF/MR Planning List that consists of all state ICF/MR residents who have been identified as not opposed to discharge to community placement.

2. To determine who is on the State ICF/MR Planning List, ODP will assess opposition to discharge by state ICF/MR residents and their involved families or guardians no later than September 30, 2011, and at least annually thereafter.

a. With the exception of those state ICF/MR residents identified in Section III.3 of the Agreement, the state ICF/MR resident's social worker or Community Transition Specialist, or both, together with the Facility Advocate, will determine whether the state ICF/MR resident should be placed on the State

ICF/MR Planning List based on discussions with the resident and involved family or guardians to assess their position as to community placement.

b. If the state ICF/MR resident does not express opposition to considering community placement, the resident will be placed on the State ICF/MR Planning List subject to the following exceptions:

(1) If a state ICF/MR resident does not express a preference for community placement and has involved family or a guardian who is opposed to community placement, the resident will not be placed on the State ICF/MR Planning List.

(2) If a state ICF/MR resident expresses a preference for community placement and has a guardian who is opposed to community placement, the resident will not be placed on the State ICF/MR Planning List.

c. If there is a disagreement among the social worker, Community Transition Specialist, and Facility Advocate as to whether a state ICF/MR resident should be placed on the State ICF/MR Planning List, the social worker, Community Transition Specialist, or Facility Advocate will notify the Facility Director, who will make the determination in conjunction with the standards in this Agreement based on review of any relevant documents and interviews with the state ICF/MR resident, the involved family or guardian, the social worker or Community Transition Specialist, and the Facility Advocate.

3. DPW will immediately place on the State ICF/MR Planning List the named Plaintiffs and any other state ICF/MR residents identified by the Facility Directors as having affirmatively expressed their desire to be discharged to the community. If one of these individuals has a guardian who subsequently objects to community placement, he or she will be removed from the State ICF/MR Planning List.

IV. Education about Community Placement Options

1. To assure that all state ICF/MR residents, their involved families, and guardians have access to appropriate information about community placement options, DPW will establish a Community Partnership Steering Committee within sixty (60) days of the Effective Date to develop and implement a program to educate state ICF/MR residents and their involved families and guardians about community placement.

a. The Deputy Secretary of ODP will appoint members of the Steering Committee, including, at minimum: a state ICF/MR resident; an individual with intellectual disabilities who lives in the community; a family member of a state ICF/MR resident; a family member of a person with intellectual disabilities who lives in the community; a representative selected by DRN; a provider representative; a representative from ODP; and a representative from the AEs.

b. The Steering Committee will develop a training curriculum that addresses how the community intellectual disabilities system works; community placement, supports, and services, including specialized programs such as those that serve individuals who are elderly, medically fragile, or have behavioral issues; funding for community services; and opportunities to participate in community life.

c. No later than ninety (90) days after the Effective Date, DPW and Plaintiffs' counsel will agree upon a training schedule. At minimum, DPW will provide trainings at each state ICF/MR at least three times each year as well as outside the state ICFs/MR in each of the four ODP Regions at least two times each year. At least one training each year will be recorded and made available to the public on DPW's website.

d. DPW will provide involved families and guardians with notice of the trainings at the facilities that serve their relatives or wards and in the Regions where they live at least thirty (30) days in advance of the training.

e. The Steering Committee will develop and disseminate to state ICF/MR residents, their involved families, and guardians written materials about community placement options, including how they can get on the State ICF/MR Planning List or find out more information.

f. The Steering Committee will work with the state ICFs/MR to assure that all state ICF/MR residents, their involved families, and guardians are periodically offered the opportunity to visit community placements that serve individuals whose needs are similar to the residents' needs and to meet with community services providers.

2. Within ninety (90) days of the Effective Date, DPW will develop and begin to implement a plan to offer one-to-one outreach to state ICF/MR residents and their involved families and guardians by family members of individuals with intellectual disabilities who currently live in the community.

3. State ICF/MR residents and their involved families and guardians will be given an opportunity after they participate in training events or have outreach contacts to state their position on discharge. To the extent that this results in any changes from their prior position on discharge, DPW will supplement or amend the State ICF/MR Planning List as appropriate.

4. DPW will continue to provide the education and outreach services required by Sections IV.1 and IV.2 of this Agreement during the term of the Agreement.

V. Development and Implementation of a Viable Integration Plan

1. DPW will develop and implement a viable integration plan (Integration Plan) that provides community placements to:

a. at least 50 state ICF/MR residents on the State ICF/MR Planning List in Fiscal Year 2011-2012;

b. at least 75 state ICF/MR residents on the State ICF/MR Planning List in Fiscal Year 2012-2013;

c. at least 100 state ICF/MR residents on the State ICF/MR Planning List in Fiscal Year 2013-2014;

d. at least 100 state ICF/MR residents on the State ICF/MR Planning List in Fiscal Year 2014-2015; and

e. at least 75 individuals on the State ICF/MR Planning List annually in Fiscal Year 2015-2016 and each fiscal year thereafter until all state ICF/MR residents on the State ICF/MR Planning List have been discharged.

2. To facilitate compliance with Section V.1 of this Agreement, DPW will take at least the following necessary steps:

a. In submitting its budget proposal to the Governor, DPW will request as one of its top budget priorities appropriations to fund the development of community placements to meet the Integration Plan's benchmarks specified in Section V.1.

b. DPW will consider the feasibility and propriety of consolidating the budget lines for state ICFs/MR and Community Waiver services;

c. Unless and until DPW consolidates the budget lines for state ICFs/MR and Community Waiver services, DPW to the extent feasible will shift funds from the carry-forward budget for state ICFs/MR to the Community Waiver services budget.

d. DPW will modify its policies and practices to assure that persons on the State ICF/MR Planning List have access to vacancies in existing community placements that match their needs, though DPW will retain discretion to assign vacancies as it deems appropriate.

3. DPW will work with individuals on the State ICF/MR Planning List, their involved families or guardians, their AEs, and the Facility Advocates to develop CPPs and ISPs that specify the community placements, services, and supports the individuals need to successfully transition to the community.

4. All individuals on the State ICF/MR Planning List will be offered community placements in which four (4) or fewer individuals reside, provided, however, that any individual can choose to live in a larger community placement that is funded by the Consolidated Waiver. Whenever an individual chooses to live in a community placement that has more than four (4) residents, DPW will notify Plaintiffs' counsel as soon as practicable after the choice has been made.

5. DPW may divert funding appropriated and allocated to implement the Integration Plan set forth in Section V.1 of this Agreement to provide community

placements to individuals living in the community who it determines are at imminent risk of institutionalization, provided, however, that: (a) DPW may not divert such funding to serve more than five (5) such individuals living in the community in any fiscal year; and (b) to the extent that this diversion of funding results in fewer than the targeted number of state ICF/MR residents identified in Section V.1 receiving community placements in any fiscal year, DPW will increase the number of state ICF/MR residents for whom DPW will provide community placements in the following fiscal year to compensate for the decrease.

VI. Status Reports

1. Beginning January 1, 2012 and every six (6) months thereafter, DPW will provide a status report to Plaintiffs' counsel and the Court on its implementation of this Agreement, including: (a) the steps DPW has taken to implement the Integration Plan outlined in Section V.1 of the Agreement (including, but not necessarily limited to, the steps identified in Section V.2 of the Agreement); (b) the number of persons on the State ICF/MR Planning List at the beginning and end of the report period and the number of persons on the State ICF/MR Planning List who were discharged to community placements during the report period; (c) whether DPW diverted funding from the Integration Plan to serve individuals living in the community under Section V.5 of this Agreement and, if so, how many individuals living in the community have been served with such

funding; and (d) implementation of the provisions related to education and outreach in Section IV of the Agreement.

2. Beginning January 1, 2012 and every six (6) months thereafter, DPW will provide Plaintiffs' counsel with: (a) a copy of the updated State ICF/MR Planning List; (b) information that identifies all state ICF/MR residents who were discharged during the report period, including their names and addresses in the community and the names of their community residential services providers; and (c) the identity of any class members who, after discharge, were admitted or committed to psychiatric hospitals or state ICFs/MR or were arrested or jailed, and a description for each such person of the circumstances that led to those situations and their current status.

VII. Approval, Enforcement, Jurisdiction, and Attorneys' Fees

1. Plaintiffs will petition the District Court for preliminary approval of the Settlement Agreement and for permission to provide class notice and to schedule a fairness hearing. If the District Court grants preliminary approval, Plaintiffs will distribute the class notice to state ICF/MR residents and DPW will distribute the class notice to involved families and guardians of the state ICF/MR residents. Plaintiffs will petition for final approval of the Agreement.

2. Plaintiffs may file a motion for specific performance to enforce alleged violations of the Settlement Agreement, provided, however, that at least

thirty (30) days before Plaintiffs file any motion for specific performance, they will provide notice of the alleged violation to DPW and offer DPW the opportunity to meet with Plaintiffs to discuss the alleged violation in an effort to resolve the dispute without judicial intervention. Defendants reserve the right to assert any available defense to a claim for specific performance, including lack of funding that is not attributable to Defendants' actions.

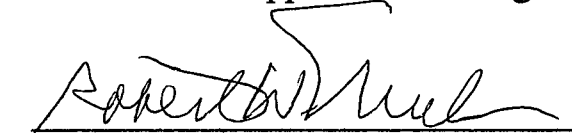
3. The Settlement Agreement is not nor is it to be construed as a consent decree. Plaintiffs may not seek a remedy of contempt of court for any violation of the Agreement.

4. The Settlement Agreement will be binding on all parties, as well as their successors, only if the Agreement is approved by the District Court, provided, however, that Defendants agree to comply with the terms of the Agreement beginning on the Effective Date pending the Court's ruling on approval of the Agreement. If the Court denies approval of the Agreement or if final approval is overturned on appeal, the litigation will be reinstated in the same procedural posture as it was at the time the parties executed the Agreement.

5. If the District Court approves the Settlement Agreement, it will retain jurisdiction over the lawsuit for purposes of interpretation and enforcement.

6. The Settlement Agreement will terminate ninety (90) days after the provision of a community placement to the last person on the State ICF/MR Planning List, at which point the Plaintiffs will seek dismissal of the lawsuit.

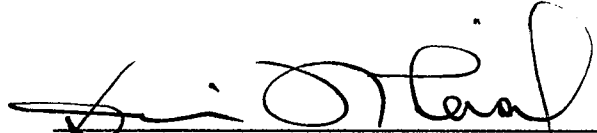
7. Defendants will pay Plaintiffs' counsel, subject to the District Court's approval, the sum of \$432,500 for attorneys' fees, litigation expenses, and costs incurred through final District Court approval of the Agreement. Nothing in this Agreement should be construed to entitle Plaintiffs to or preclude Plaintiffs from recovery of attorneys' fees, litigation expenses, and costs incurred after the final District Court approval of the Agreement.



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Dated: May 19, 2011



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Dated: May 19, 2011